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Supreme Court of the United States

October Term, 1957

No. 841

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1957

No.....

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Oleta O'Connor Yates respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment in criminal contempt and sentence of one year imprisonment imposed upon petitioner by District Judge William C. Mathes, a Judge of the United States District Court for the Southern District of California, Central Division, after a prior sentence of one year imprisonment in the same criminal contempt proceeding had been vacated by this Court and remanded to the aforesaid District Judge for "resentencing in the light of this opinion." *Yates v. United States,* 355 U.S. 66, 76.

Opinions Below.

The per curiam opinion of the Court of Appeals, not yet reported, is annexed hereto as Appendix A. The written opinion rendered by the District Judge, not yet reported, is annexed hereto as Appendix B.[1]

Jurisdiction.

The judgment of the Court below, annexed hereto as Appendix C, was made and entered on February 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Questions Presented.

1. Whether the imposition of the same sentence of one year imprisonment, after vacation of the prior sentence herein and remand, violated and arbitrarily disregarded the express and implied directions of the opinion and mandate of this Court.

2. Whether the imposition of the one-year sentence of imprisonment in summary contempt was inherently and inextricably based upon irrelevant, extraneous and capricious grounds with respect to alleged matters *dehors* the record and outside the presence of the court, con-

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[1]The opinion of this Court, vacating the sentence in contempt and remanding for resentence, is reported, as aforesaid, in 355 U. S. 66. The prior opinions of the Court of Appeals and the District Judge in the initial proceedings are set forth in the appendices to the first petition for a writ of certiorari herein. *Yates v. United States*, October Term, No. 547. The opinions are officially reported in 227 F. 2d 851; 107 F. Supp. 408; 227 F. 2d 844; 107 F. Supp. 412; 227 F. 2d 848. The opinion of this Court reversing the Smith Act conviction out of which the contempt proceedings arose is reported in 354 U. S. 298. The transcript of the proceedings in the Smith Act action, referred to hereafter as "Tr.", is on file in this Court. October Term, 1956, Nos. 6, 7, 8.

trary to law and without due process of law in violation of the due process provisions of the Fifth Amendment.

3. Whether the sentence of one year imprisonment, after remand, "imposed upon petitioner under the circumstances herein was contrary to law and policy in the administration of justice in summary contempt proceedings and so unnecessarily severe, grossly excessive and arbitrary as to constitute a manifest abuse of discretion, cruel and inhuman punishment and a deprivation of petitioner's liberty without due process of law in violation of the due process provisions of the Fifth Amendment and the provisions of the Eighth Amendment."[2]

Constitutional and Statutory Provisions Involved.

The pertinent constitutional and statutory provisions involved are set forth in Appendix D annexed hereto.

Statment of the Case.

The facts material to the consideration of the questions presented above rquire initially, it is submitted, a brief summary of the time which this petitioner spent in jail before, during and after the principal criminal trial and the contempt proceedings which arose out of that trial.

A. Petitioner was arrested in San Francisco on July 26, 1951, following the return of the Smith Act indictment. Bail was fixed at $7,500.00 and petitioner furnished the bail the same day and was released. The next

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[2]The identical question was presented in the prior petition for a writ of certiorari (Question No. 3, Petition, *Yates v. United States*, October Term, 1955, No. 547) granted by this Court. 350 U. S. 947.

day, July 27, 1951, on motion of the United States Attorney, bail was increased to $50,000.00 pending removal proceedings, and petitioner was returned to jail. On August 1, 1951, petitioner was transferred from the jail in San Francisco to the jail in Los Angeles. Petitioner was arraigned on August 2, 1951, and on August 8, 1951, bail was fixed at $25,000.00 by District Judge Carter, a Judge of the United States District Court for the Southern District of California, then assigned as trial judge in the criminal cause. See, 191 F. 2d 692. Petitioner was unable to furnish the said bail, and a petition for a writ of habeas corpus seeking a reduction of bail was dismissed on August 15, 1951. Following the disqualification of District Judge Carter, District Judge Mathes was assigned to preside as trial judge in the cause. On August 30, 1951, on an application to reduce bail, District Judge Mathes instead increased the bail to $50,000.00, and a subsequent petition for writ of habeas corpus to another district judge was dismissed. On October 3, 1951, the court below affirmed. 192 F. 2d 56. On November 5, 1951, this Court concluded that bail had not been fixed by proper methods and remanded to the District Court. 342 U. S. 1. On November 29, 1951, the said District Judge, despite the opinion of this Court, refused to reduce the bail of $50,000.00. 102 F. Supp. 52; 102 F. Supp. 75. On December 7, 1951, the Court of Appeals reversed and fixed bail itself in the sum of $10,000.00. 193 F. 2d 875; 193 F. 2d 1002. Petitioner was released on bail on December 10, 1951.

Petitioner thus spent 136 days in jail in pre-trial bail proceedings, the said District Judge remaining adamant to the end that petitioner should not be released on bail in a sum less than $50,000.00, and this, after remand by

this Court on the ground that traditional standards of fixing bail, and the constitutional prohibition of excessive bail, were violated when bail was fixed in the unusual amount of $50,000.00.[3]

B. The initial contempt proceedings took place during the trial of the criminal action on June 26, 1952. For her failure to answer the first four identifying questions, petitioner was immediately remanded to jail as punishment for a civil contempt. 107 F. Supp. 408. For the duration of the trial, petitioner remained incarcerated. The verdict of the jury was returned on August 6, 1952. On August 7, 1952, a maximum sentence of five years imprisonment and $10,000.00 fine was imposed on petitioner. The said District Judge denied bail pending appeal. See, 106 F. Supp. 941. On August 8, 1952, the District Judge imposed the eleven concurrent one year sentences in criminal contempt for failure to answer the identifying questions put on the third day of cross-examination (June 30, 1952), the sentences to commence following execution of the five year sentence of imprisonment. See, 227 F. 2d 851.

On August 15, 1952, the Court of Appeals directed the District Judge to fix bail pending appeal in the principal criminal action. See, 106 F. Supp. 941, 944. On August 18, 1952, the District Judge, despite the direction, again denied bail pending appeal. 106 F. Supp. 941. On August 29, 1952, the Court of Appeals itself fixed bail pending appeal in the criminal cause at $20,000.00. On August 30, 1952, petitioner furnished the

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[3]A note to the decision by this Court in *Stack v. Boyle*, 342 U. S. 1, reads in part: "Notwithstanding the decision of the Supreme Court of the United States, the district court denied these motions [to reduce bail]. . . . ." 96 L. ed. 14, 17.

said bail and was released by another District Judge—but directed to return before District Judge Mathes with respect to the still outstanding order in "civil contempt." See, 107 F. Supp. 408.

On September 3, 1952, the said District Judge Mathes held that petitioner was still subject to the order in "civil contempt," even though the criminal trial had ended, and directed petitioner's return to jail. 107 F. Supp. 408. On September 4, 1952, petitioner returned to her prison. Bail pending appeal was denied by the District Judge. On September 5, 1952, the Court of Appeals stayed execution and granted bail pending appeal. Petitioner furnished bail pending appeal and was released on September 6, 1952—but petitioner was again told to appear before District Judge Mathes on September 8, 1952. The reason for this order was not known to petitioner. See, 107 F. Supp. 412.

On September 8, 1952, District Judge Mathes, without prior notice, imposed a sentence of three years imprisonment in criminal contempt for the refusal to answer the same first four identifying questions of June 26, 1952. 107 F. Supp. 412. Bail pending appeal was denied, and petitioner was returned to jail. On or about September 10, 1952, the Court of Appeals ordered petitioner's release on her own recognizance pending appeal: Petitioner was released on September 11, 1952.

Petitioner had spent 70 days in jail during these contempt and post-trial proceedings.

C. Before the contempt proceedings took place below following the remand by this Court, the said District Judge Mathes was also aware of the following matters: that the order holding petitioner in coercive restraint after trial for civil contempt had been reversed (App. B, p. 5); that the three year sentence of imprisonment in criminal contempt had also been reversed (App. B, p. 5); that the judgment of conviction in the principal cause had been reversed by this Court (App. B, p. 4), and upon the government's motion, the indictment had thereafter been dismissed upon the representation of the prosecutor that the evidentiary requirements laid down by this Court could not be met (App. B, p. 4); and that ten of the eleven specifications in these contempt proceedings had been reversed by this Court, the sentence in the single contempt conviction vacated, and the cause remanded to the District Court for resentencing "in the light of the opinion of this Court." (App. B, p. 6).

D. The aforesaid circumstances serve as a background to the proceedings herein which took place before the said District Judge after remand by this Court and the spreading of the mandate on the minutes of the District Court. The proceedings took place on January 28, 1958. The hearing was quite perfunctory since the District Judge had already prepared prior thereto a written opinion imposing once again the sentence of one year imprisonment upon petitioner. [R. 14-26],[4] the opinion

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[4]The reference "R." is to the reporter's transcript of proceedings contained in the certified record filed herein with this petition.

being handed to counsel at the hearing and after the District Judge had been urged to mitigate the punishment in the light of the factors set forth in this Court's opinion, the entire background aforestated, petitioner's serious illness and the private employment which she so precariously held because of her illness [R. 2-14]. We discuss in detail hereafter the nature and character of the rulings contained in the written opinion of the District Judge.

Petitioner was returned immediately to jail on January 28, 1958. Bail pending appeal and a stay of execution for opportunity to seek bail in the Court of Appeals was denied [R. 35, 37], the District Judge deeming the appeal "frivolous in the extreme" [R. 35]. Reminded that this Court had previously granted certiorari on the question, among others, of whether the sentence was not excessive in the light of legal and constitutional standards, the District Judge stated:

> "Mr. Margolis, my own view is—with all deference—that certiorari would never have had one vote in the Supreme Court—or perhaps three—if it hadn't been for the Smith Act case there at the time." [R. 28].

When counsel urged that the question could not be "frivolous" if the Supreme Court had previously granted certiorari on the same question, the District Judge replied:

> "That is very true, Mr. Margolis. But I can indicate, and I don't hesitate to indicate my views on the matter. I thought the original appeal was friv-

olous. So you can imagine what I think of this appeal.

"Mr. Margolis. But the point I am making, your Honor—

"The Court: And I have been reversed, and I will be reversed again. It is a great comfort to me to have those courts up there to correct my error." [R. 32-33].

E. An application for bail pending appeal was made to the Court of Appeals. That Court by order on February 3, 1958, consolidated the argument for bail togethe with argument on the merits. On February 7, 1958, the Court affirmed the judgment of the District Court (App. A). The Court held again that the sentence was "severe"; but within constitutional bounds and the judge's discretion. The Court interpreted the mandate of this Court to be that the trial judge "should take another look at some ameliorating circumstances", but not as an issuance of a "command that the sentence be reduced" (App. A, p. 2). Bail in the sum of $5,000.00 pending determination of a petition for a writ of certiorari was granted (App. A, p. 2). Petitioner furnished the said bail and was released on February 12, 1958, after 15 days of imprisonment on this occasion.

In toto, petitioner was imprisoned during the pretrial and post-trial bail and contempt proceedings for a period of 221 days, or a term in excess of 7 months.

ARGUMENT.

The court below has decided an important question of federal law which has not been, but should be, settled by this Court; has rendered a decision in conflict with applicable decisions of this Court and other courts of appeals on the same matter; and so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by the district court, as to call for an exercise of this Court's power of supervision.

I.

The Resentencing of the Petitioner to the Same Term of One Year Imprisonment on the Single Specification of Contempt and the Arbitrary Refusal to Consider or to Apply the Specified Mitigating Factors Was Inconsistent With and in Violation of the Opinion and Mandate of This Court.

The opinion and mandate of this Court in these contempt proceedings have been more honored in the breach than in the observance. It is not to be assumed that this Court spoke lightly when it vacated the previous sentence of one year imprisonment, and remanded the case to the District Court for resentencing "in the light of this opinion". The factors which this Court enumerated in its opinion were not only "ameliorating circumstances", but they were relevant and pertinent guides for the exercise of a drastic power subject to constitutional and statutory limitations. *Ex parte Hudgings*, 249 U. S. 378, 383.

Punishment for summary contempt can become arbitrary and unfettered, contrary to legislative purpose and the true interests of justice, if a court overlooks that it

is punishing only for a single contempt, that the contemnor has already served a lengthy term of imprisonment, that the performance of judicial duty was not obstructed, that the single contempt was grounded solely upon understandable claims of conscience, and that all legal proceedings against the contemnor have been terminated. It is, of course, true that this Court in remanding did not suggest the amount of punishment, but it would appear clear, it is respectfully submitted, that the opinion and mandate of this Court called for reappraisal of the sentence and consideration of factors looking toward reduction in the grossly severe sentence of one year imprisonment.[5] Nevertheless, the District Judge in a prepared written opinion, essentially disregarded every circumstance which led this Court to vacate the original sentence and which the District Court was requested to consider on resentence. Indeed, a number of the factors were capriciously distorted into an opposite significance and used as a basis for imposing the same harsh sentence previously imposed. Neither the letter nor the spirit of the opinion and mandate of this Court was obeyed.

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[5]This Court appeared to be unanimous in holding that the prior one year sentence should be vacated, and consideration given to the mitigating factors stated in the opinion. This was, of course, the opinion of Mr. Justice Clark writing for the majority. Mr. Justice Burton also concurred in the remand "in view of all the circumstances." Since the dissenting Justices were of the view that no punishable contempt had been committed and that the case presented "a shocking abuse of judicial authority", it appears that the Justices were at least agreed that a reappraisal of the sentence in the light of the mitigating factors set forth in the majority opinion was required. Whether or not, therefore, the opinion and mandate of this Court impliedly called for a reduction in sentence, it cannot be disputed that the District Court was directed to appraise the sentence "in the light of" the enumerated factors set forth in the opinion of this Court.

(a) This Court observed that the trial judge's judgment as to the proper penalty may have been affected by the view that petitioner had committed eleven separate contempts. This Court held specifically that only a single contempt had been committed, and reversed specifications II-XII, inclusive. Clearly, the offense under such circumstances was far less aggravating than first decided.

These specific rulings were completely ignored by the District Judge. Indeed, as if the opinion and mandate of this Court were non-existent, the District Judge continued to treat petitioner as if she had committed the same series of contempts, stating that petitioner "repeatedly declined to answer questions" [R. 16]; was in "repeated defiance of the court" [R. 17]; was seeking "a license to 'pick and choose' the questions [s]he deigns to answer" [R. 25].

(b) This Court pointed out that petitioner had served a total of over 70 days in jail awaiting final disposition of the several proceedings against her. This was plainly a mitigating factor; yet the District Judge did not even mention this matter in his written opinion, and clearly this factor was ignored because the same sentence of one year imprisonment was again imposed. Nor was this mere oversight, for the matter contained in this Court's opinion was brought to the court's attention by counsel at the hearing in the district court, and attention was also called to the "six or seven months" petitioner had spent in jail in connection with the bail proceedings [R. 6].

(c) This Court pointed out that the conspiracy conviction as well as another criminal contempt conviction had been reversed, and that the sentences imposed in these proceedings had been termed "severe" by the Court of

Appeals.[6] The weight given by the District Judge to these factors was precisely zero, as was the additional factor that the indictment against petitioner was dismissed on the prosecutor's own motion.

(d) This Court pointed out that the District Judge should consider the extent of the "defiance of the court's order [and] the seriousness of the consequences of the contumacious behavior." "In this regard," stated the Court, "petitioner's understandable reluctance to be an informer, . . ., is a factor." This factor was mentioned by the District Judge, but it was used not in mitigation of punishment, but as a reason for imposing the same one year term of imprisonment. In disregard of the factual record (some of which is recited in this Court's opinion), and in plain disregard of the holding of this Court, the District Court invoked petitioner's reluctance to become an informer as one of the basic reasons for imposing this grossly severe sentence [R. 20].

Clearly, strictures to this Court with respect to the policy of encouraging persons to report violations of law to governmental authorities [R. 20], or the right of witnesses to obtain compulsory process [R. 21], were unnecessary and irrelevant here. What was involved in this particular case was not a refusal to answer all questions, nor even a refusal to testify with respect to some pertinent matters involving the petitioner's alleged illegal conduct. On the contrary, petitioner testified fully and at length on cross-examination and answered all questions except in one area only. In that area (the refusal to identify certain persons as Communists) the

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[6]The Court of Appeals has again termed the sentence "severe" (App. A, p. 1).

opinion of this Court notes, from the record, that the refusal was grounded on a conscientious unwillingness to injure innocent persons in their employment or other normal activities. The majority opinion of this Court noted that petitioner had only declined to identify persons as Communists who would be themselves hurt by such identification or their families. This Court noted also that petitioner made such identification when she believed no injury would be done. Thus, in only a very narrow area involving injury to innocent persons had there been a refusal to testify; in all other respects the witness had testified fully and at length.

It was in the aforesaid context that this Court called upon the District Court to consider petitioner's "understandable reluctance to be an informer." Indeed, in 1952, in the contempt proceedings, the same District Judge stated: "Anyone can have an appreciation of the sportsmanlike spirit that might prompt a person not to be an informer" [O. R. 27].[7] Yet the District Judge treated the petitioner here as if she were simply a witness who had refused to answer any questions at all. The use of the contempt power in this manner arbitrarily thwarts the policy of the law and does violence to the mandate of this Court. This Court stated in its opinion: "The policy of the law must be to encourage testimony; *a witness willing to testify freely as to all areas of investigation but one, should not be subject to more numerous charges of contempt than a witness unwilling to give any testimony at all.*" (Emphasis supplied.)

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[7]The reference "O. R." is to the original transcript of record in the prior hearing before this Court. October Term, 1955, No. 547.

(e) Another factor which this Court noted was petitioner's "apparently courteous demeanor." So far as the words spoken are concerned, the District Judge states "defendant Yates was courteous" [R. 21]. The printed record, it is conceded, shows only courteous language. Petitioner's manners were "impeccable", states the District Judge, but these manners were only "insincere mockery." It is stated that a "condescending attitude of contemptuous superiority" was revealed "in the inflection of voice, the expression of the face and the hands, the shrug of the shoulders" [R. 22].

In 1958 the District Judge purports to emphasize alleged matters not contained in the record in 1952. Two initial observations should be made: first, ordinarily it is only when a contemnor has acted disorderly, as revealed in the record, that recourse is had to supplemental conjectures outside the "cold printed record". If the record reveals that the contemnor spouted epithets or threatened the Judge or others, it is reasonable in the light of human experience to conjecture that the epithets or threats were accompanied by heated attitudes or disagreeable facial expressions. But when a record reveals the most courteous and deferential attitude of the witness to the court over many days of extended examination, and throughout all the proceedings, it is a dangerous and arbitrary conclusion to assume as a basis for the invocation of the drastic power of contempt that the courteous witness intended disrespect for the court by the "inflection" of her voice, the "expression" of her face and hands, or the "shrug" of her shoulders.

In the second place, a trial judge confronted with the alleged "insincere mockery" of an "impeccable" and "courteous" witness is not bereft of power to record these

matters for an appellate court. A trial judge can always "make a record". Yet, there is not a word in the prior transcripts, either in the main trial proceedings or the subsequent contempt proceedings after trial, which even reflects such a subjective attitude on the part of the District Judge. The Certificate of Criminal Contempt [O. R. 3-16] makes no mention of these matters, despite the fact that the law requires the certificate in summary contempt (for well-established historical reasons, *Nye v. United States*, 313 U. S. 33, 44-48) to "recite the facts". Rule 42(a) of the Federal Rules of Criminal Procedure.

Moreover, in the original contempt proceedings, the District Judge insisted that punishment was being imposed, not to vindicate the dignity of the Court, but its authority [O. R. 36-37]. Punishment for contempt is imposed solely for obstruction of the judicial process, not merely for a violation of the judge's subjective feelings relative to admittedly lawful behavior. Mr. Justice Frankfurter observed in *Pennekamp v. Florida*, 328 U. S. 331, 368: "The opinion of the court illustrates the danger of confusing correction of interference with judicial action with concern over a court's dignity." "It [the contempt power] is a mode of vindicating the majesty of law, *in its active manifestation, against obstruction and outrage*. The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged." (*Offutt v. United States*, 348 U. S. 11, 14 (emphasis supplied).

In addition to all of the above, the record contradicts the observations now made by the District Judge. When the petitioner was first cited for contempt, she stated:

> "Well, I would like to state to the court that there was no intent on my part to show any disrespect for the court or for the rulings of the court or

for the power or authority of this court. I stated what I did state because in all conscience I cannot do otherwise and I must maintain that position, with all due respect to your Honor and to the court." [Tr. 11,367].

Following a plea by counsel, the District Judge replied:

"The only matter here, Mr. Margolis, is not a question of any disrespect to the person of the judge. It is only a question of defiance of the authority of the court. The question was asked. In fact, several questions were asked. Objections were made. Objections were overruled. The witness was instructed to answer. She refused to answer the questions. As I view it, that's all I can consider." [Tr. 11,371].

(f) This Court stated that another factor was that petitioner's "refusals seem to have had no perceptible effect on the outcome of the trial." This was a most significant mitigating factor. The processes of the court had not been obstructed; the identification by prosecution witnesses of the named persons as Communists was not contested by petitioner. In every case, when asked, she admitted that she knew these persons and how long she knew them. The prosecution went to the jury without any dispute on the issue of identification, and obtained a verdict. Nevertheless, the District Judge in his written opinion makes no mention of this factor, and the sentence of one year imprisonment was imposed as if no opinion by this Court had ever been written; as if petitioner had refused to answer all questions put to her and as if she had somehow in this way obtained a verdict of acquittal, instead of the verdict which was actually returned.

(g) This Court stated that it was "necessary" for the trial judge to reconsider the sentence in the cool reflection

of subsequent events. It appears perfectly plain, it is respectfully submitted, from the opinion and action of the District Judge that the admonition was wholly disregarded. All the events which occurred after the trial, the reversal and dismissal of the main case, the reversal of the other contempt proceedings, the reversal of ten of the eleven specifications here, the recital of the various factors to be considered in imposing punishment—all were essentially ignored. The District Judge appeared determined, as he had been throughout all the pre-trial and post-trial proceedings, to see to it that petitioner was confined in jail for a lengthy term despite the orders, instructions and admonitions of the appellate courts.

As we discuss hereafter, the imposition of punishment here was based, not upon the opinion and mandate of this Court, but inherently upon alleged matters *dehors* the record and assumedly not in the presence of the court. Assertions never previously advanced were made by the District Judge in his opinion which have no factual support in the record; the narrow refusal of petitioner was described as "the ultimate in contempt" [R. 30]; and the petitioner was admonished to reflect how much worse her fate would have been in "Communist Russia" [R. 25].[8]

It is respectfully submitted that the letter and spirit of the rulings and directions of this Court were violated by the courts below. The opinion and mandate of this Court were essentially flouted.

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[8]Mr. Justice Brandeis once stated that a rule of reason can only be applied correctly by the exercise of good judgment; "and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty." *Schaefer v. United States*, 251 U. S. 466, 483.

II.

The Imposition of the One Year Sentence of Imprisonment, Based Inherently on Unlawful, Irrelevent, Extraneous, Vague and Uncertain Grounds and Without Factual Support in the Record, Was Contrary to Law and Constituted a Manifest Abuse of Discretion.

Not only were the factors set forth in the opinion of this Court disregarded, but principal reliance was placed by the District Court on new matters nowhere appearing in the record, upon extraneous conjectures and surmisals unsupported and refuted by the record, and upon issues wholly unrelated to the issues in the contempt proceedings. That sentences of contempt so entangled with extraneous and irrelevant factors violate essential principles of due process and are illegal as in excess of judicial power, is well established. *Oates v. United States*, 223 Fed. 1013 (C. A. 4, 1915); *Gridley v. United States*, 44 F. 2d 716, 743 (C. A. 6, 1930); *Vetterli v. United States*, 344 U. S. 872; *Wilborn v. State*, 156 Tex. Cr. 483, 243 S. W. 2d 839 (1953).

(a) We consider first the assertion by the District Court that petitioner's taking the stand in her own defense in a serious criminal trial was a "cleverly-staged stratagem, affording her the opportunity in effect to argue the defendants' case to the jury while purporting to give evidence on the issue of her state of mind or intent" [R. 16].

Initially, a "cleverly-staged stratagem" ordinarily occurs out of the Court's presence. If such action is to play any part in the determination of a sentence in a criminal contempt proceeding, a party is ordinarily entitled to notice and hearing before an unbiased judge be-

fore such conclusion is drawn. We discuss the due process aspects of this question in the next point of this petition.

Secondly, the objective evidence at the criminal trial contradicts this conclusion by the District Judge. Annexed hereto and marked Appendix E is an analysis, by page references to the record, of the prosecutor's objections to the questions put to petitioner on her direct and redirect examination; the grounds for the objections; counsel's answers to the prosecutor's objections; and the rulings of the District Judge. The table reveals the following: 84 objections made by the prosecutor were overruled by the trial judge; 16 were sustained. On 49 occasions the prosecutor objected to a question as irrelevant, collateral or invading the province of the jury. Counsel answered the objections by contending that the question went to the state of mind or understanding of petitioner. Each of the 49 objections *was overruled* by the District Judge.[9] The few objections which the District Judge sustained were principally as to matters of form, and no ruling was based upon an asserted ground that petitioner was attempting to argue her case to the jury while purporting to give evidence on the issue of her intent. See, Appendix E.

The aforesaid factual record establishes a consistent holding by the District Judge over the prosecutor's objections that the testimony sought by petitioner's direct and redirect examination was competent, material and

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[9]The District Judge also overruled objections that the questions were leading and suggestive; that no proper foundation had been laid; that the questions were vague and ambiguous; that facts had been assumed not in evidence; and that questions were argumentative or not proper in form. See, Appendix E herein.

relevant on the crucial issue of specific intent. In asserting that petitioner's appearance was designed to argue the "case to the jury", the District Judge arbitrarily overlooked the record.

In the third place, it is difficult to reconcile the Court's reference to a "clearly-staged stratagem" with the statement of the Court to petitioner's counsel at the conclusion of the main criminal trial:

> "The Court: Before we proceed with that, I want the record to show, before I overlook it, that the court appreciates very much the help of defense counsel throughout this trial. I want to make a public commendation of not only your diligence, but the character and quality of your work. You have been most helpful to the court on all questions of law which have arisen and have done it in a manner which is a credit to the profession." [Tr. 14,075.]

Fourthly, the Certificate of Contempt entered at the conclusion of the trial on July 8, 1952 [O. R. 3-15] makes no reference to any such alleged stratagem.

Fifthly, in the minutes of the contempt proceedings there is no reference, directly or indirectly, to any such device. On the contrary, the District Judge expressed the view that the position of petitioner was "somewhat analogous to a situation where *well-meaning* young people, some who call themselves Jehovah's Witnesses and others who won't claim conscientious objections to war, but who refuse to obey the law" [O. R. 29]. (Emphasis supplied.)

(b) The District Judge states that he learned from petitioner's "own lips" that she became convinced that the peaceful methods of the Socialist movement would not

be successful in this country; that for this reason she cast her lot with the Communist Party and embraced "Lenin's teaching that only through forcible overthrow of the capitalist governments in power can socialism be established." [R. 20].

That these assertions were extraneous and irrelevant to these contempt proceedings appears plain. Moreover, there is no evidence in the record to support these statements, and indeed the record is quite to the contrary. The petitioner testified she left the Socialist Party because it did not concern itself sufficiently with the day-to-day problems of the people [Tr. 10,210-10,213]. The petitioner repeatedly testified that she did not advocate the forcible overthrow of the Government of the United States [Tr. 11,153-11,160], nor did she interpret the writings of Lenin as so advocating [Tr. 11,005-11,014].

(c) The District Court asserts that petitioner's contempt was "planned, deliberate and cynical", that she knew "when she elected to take the stand that she would almost certainly be called upon to defy the authority of the court" [R. 21].

A "planned" contempt is certainly not one in the presence of the court. Petitioner never received any notice that she was charged with such offense, nor did she ever have any hearing with respect thereto. The District Court never made such an assertion during the trial, or after. The Certificate of Contempt makes no such accusation.

Nor is there any basis for the court's opinion that petitioner must have known when she took the stand that she would "be called upon to defy the authority of the court". [R. 21]. The petitioner's direct examination was

specifically limited to the question of her specific intent, her knowledge and understanding of the principles of Marxism-Leninism and the background of her own life. The Government witnesses on the prosecution's direct case had identified the named persons as Communists. This identification was never contradicted by petitioner in her direct examination. It, was for this reason this Court instructed the District Court to consider the fact that petitioner's refusals "seem to have had no perceptible effect on the outcome of the trial." It was not petitioner, therefore, who knew that she would be called upon "to defy the authority of the court". It was the prosecutor who in his cross-examination went beyond the direct examination of petitioner, and multiplied the contempts after the first refusal of petitioner, who precipitated the proceedings here. Clearly, this was not a procedure which petitioner can be charged with knowingly and cynically planning.

(d) The District Court states that the printed record cannot reproduce the setting in which the action took place: "the all-but-audible 'cheering' and 'booing' of the 'rooting section' in the audience; the supercilious half-smirk, half-smile visages of the thirteen co-defendants who inaudibly applauded every defiance." [R. 22].

Nothing in the prior record, the Certificate of Contempt, or the contempt proceedings indicates that the Court in 1952 entertained such subjective feelings.

But in a more fundamental sense, how can any of these matters be charged to petitioner in a remand proceeding involving punishment for her contempt? Clearly, she was in no way responsible for the "all-but-audible" action of the audience, nor can the "inaudible" applause or

visages of her co-defendants be attributed to petitioner. These were extraneous and irrelevant matters which the District Judge could not properly consider in these contempt proceedings, it is respectfully submitted.

(e) The District Court held that the petitioner should not complain of the severity of the sentence, because in Communist Russia "(in 1952, not 1958)"—she would have probably received for like conduct a sentence of life imprisonment "in the mines or the forests of Siberia—or perhaps only until the crack of a rifle in the dawn of the day after" [R. 25].

Petitioner, of course, was not charged with, nor proved to be, an agent of a foreign power. Nor was there any proof in the record as to the administration of the criminal laws, or the punishment for contempt, in the Soviet Union. But obviously, and more fundamental, is the point that the standards governing the punishment for criminal contempt in American courts cannot be governed by the standards adopted in "Communist Russia".

It was considerations such as these which permeated the opinion of the court below. It was these arbitrary, unlawful and extraneous factors which served inherently as the basis for punishment, instead of the factors set forth in the opinion and mandate of this Court.

III.

Since the Imposition of the One Year Sentence of Imprisonment Was Based Principally Upon Charges of Alleged Conduct Not Occurring in the Presence of the Court, the Judgment in Summary Contempt Made Without Notice or Hearing on Said Charges Was Contrary to Law and Deprived Petitioner of Her Liberty Without Due Process of Law in Violation of the Due Process Provisions of the Fifth Amendment.

All of the aforesaid extraneous matters and alleged conduct occurring outside of the presence of the court were not properly before the court in a 42(a) proceeding. Rule 42(a) vests the summary contempt power in a district judge only if the court "certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

For matters occurring outside of the presence of the court, Rule 42(b) of the Federal Rules of Criminal Procedure governs. A criminal contempt under 42(b) must be prosecuted on notice; the notice must state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and must state the essential facts constituting the criminal contempt charged and describe it as such. "If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

None of the procedural safeguards were provided petitioner with respect to those matters allegedly occurring outside the presence of the court, and which the court took into consideration in imposing punishment. In so

doing, the District Court not only exceeded its jurisdiction under the law, but deprived petitioner of her liberty without due process of law. See, *Nye v. United States,* 313 U. S. 33; *Farese v. United States,* 209 F. 2d 312 (C. A. 1, 1954).

IV.

The Sentence of One Year Imprisonment for Contempt, Imposed After Remand by This Court and Under the Circumstances Herein, Was so Harsh, Grossly Excessive and Arbitrary as to Constitute a Manifest Abuse of Discretion, Cruel and Unusual Punishment and a Deprivation of Petitioner's Liberty Without Due Process of Law in Violation of the Due Process Provisions of the Fifth Amendment and the Provisions of the Eighth Amendment.

The issue of the excessiveness of the sentence in the light of constitutional, statutory and policy standards was before this Court in the prior hearing. The question was discussed in detail in the prior petition for a writ of certiorari (Pet., October Term, 1955, No. 547, pp. 26-32; and Appendix H therein); in the brief before this Court (Br., October Term, 1956, No. 15, pp. 40-58); and was twice argued before this Court before the rendition of the decision.[10] The matter was left undecided when this Court vacated the sentence and remanded the case to the District Court for resentencing in the light of the opinion.

For the aforesaid reasons, we restrict the argument here solely to a summary of the considerations which

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[10]This Court stated in its opinion: "Finally, petitioner contends that her one-year sentences were so severe as to violate due process and constitute cruel and unusual punishment under the Eighth Amendment." *Yates v. United States,* 355 U. S. 66, 70.

affect, it is respectfully submitted, the determination of this fundamental question.

(a) If the original sentence of one year imprisonment merited review by this Court, the imposition of the same harsh sentence after remand raises the constitutional and legal questions in an even more serious form. This Court held in its opinion vacating the original sentence that the record showed that petitioner did not commit 11 separate contempts, but only a single contempt; that petitioner had spent a total of over 70 days in jail awaiting final disposition of the several proceedings against her; that the conspiracy conviction as well as another criminal contempt conviction had been reversed; that petitioner's reluctance to testify in a very narrow area (she testified fully otherwise) was understandable; and that petitioner's refusal to testify had no perceptible effect on the outcome of the trial. The circumstances on remand, therefore, were even less aggravating than they had been on the initial imposition of sentence.

(b) Moreover, since the rendition of this Court's decision, but before the resentencing here, the conspiracy conviction had not only been reversed, but the indictment had been dismissed on the prosecutor's own motion. Petitioner had therefore spent 136 days in jail during bail proceedings in a cause finally terminated in her favor. In addition, since the opinion of this Court, petitioner spent an additional 15 days in jail following the resentencing before obtaining her release on bail pending the application herein. The imposition of a one year prison sentence in summary contempt under all the aforesaid circumstances is cruel and unusual and a manifest abuse of judicial authority.

(c) In other Smith Act prosecutions where the same issues arose, only a 30 day sentence was imposed. This was true of Judge Chesnut in Baltimore and Judges Medina and Dimock in New York. In the *Dennis* trial, Judge Medina imposed a sentence of 30 days in a situation far more aggravated than the one herein. *United States v. Gates,* 176 F. 2d 78 (C. A. 2, 1949). In no other Smith Act trial had the contemnor spent 85 days in jail in contempt proceedings and 136 days in bail proceedings, nor were the other mitigating factors present. Yet the sentence here is twelve times greater than the sentence imposed by other trial judges in the aforesaid Smith Act prosecutions.

(d) Other federal courts under circumstances far more serious to the administration of justice than the case herein have imposed much lesser punishment than the District Judge here. A review of the cases indicates a marked disparity between the sentence imposed here and the sentences imposed by other federal judges (*Pet. for Writ of Certiorari,* October Term, 1955, No. 547, Appendix H).

(e) Contempts not in the presence of the court, which often are of a serious character, are punishable only by a maximum prison sentence of six months. 18 U. S. C. 402. The section "ought to have great weight in punishing criminal contempts under section 385 of 28 U. S. C. A. [now 18 U. S. C. 401]." *Ryals v. United States,* 69 F. 2d 946, 948 (C. A. 5, 1934).

(f) In state jurisdictions, 29 states provide by statute for a maximum sentence of 30 days or less for contempt. One has a maximum of three months. Nine have a maximum of six months. Only three states have no statutory

limitations. (*Pet. for Writ of Certiorari, supra*, pp. 31-2).

(g) The single contempt here was based upon understandable conscientious scruples; the witness in all respects answered questions fully and at length. Considering the undisputed state of the record and the other mitigating factors, the grossly severe sentence of one year imprisonment imposed upon petitioner principally to overcome her reluctance to become an informer was unjustified (Brief, October Term, 1956, No. 15, pp. 44-50).

(h) There was no obstruction of the judicial process and the single narrow refusal to testify had no effect on the outcome of the trial. The power to punish for contempt rests solely on "an obstruction to the performance of judicial duty resulting from an act done in the presence of the court" (*Ex parte Hudgings*, 249 U. S. 378, 383).

(i) The power of a district court to punish for contempt is subject to constitutional and statutory limitations. Law and history combine to confine the exercise of punishment for contempt to "the least possible power adequate to the end proposed". *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 231. (Brief, October Term, 1956, No. 15, pp. 29-31).

The foregoing considerations establish, it is respectfully submitted, that the sentence imposed here was a manifest abuse of judicial discretion. The excessive length and severity of the sentence in relation to the offense charged is grossly disproportionate and violates the "cruel and unusual" provisions of the Eighth Amendment. *Weems v. United States*, 217 U. S. 349, 368-74. The sentence was so arbitrarily imposed as to deprive

petitioner of her liberty without due process of law, and imposed under circumstances which violate "civilized standards of procedure" (*McNabb v. United States,* 318 U. S. 332, 340.)

Conclusion.

The petition for a writ of certiorari should be granted, the judgment of the court below vacated and the case remanded to the district court with directions to enter an order reducing the sentence to the time served and discharging the petitioner from any further custody.

Respectfully submitted,

BEN MARGOLIS and
LEO BRANTON, JR.,
By BEN MARGOLIS,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals.

United States Court of Appeals, for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 15,880.

Feb. 7, 1958.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, Chief Judge, FEE and CHAMBERS, Circuit Judges.

PER CURIAM:

On July 26, 1955, this court affirmed a judgment under which Oleta O'Connor Yates was sentenced to one year's imprisonment for contempt of court. Yates vs. United State of America, 227 F. 2d 851. Our opinion was reversed, Yates vs. United States, 355 U. S. 66, the Supreme Court holding that the series of questions to which answer had been refused constituted one single contempt and not eleven separate contempts, each of which had been the subject of a separate charge. The case was remanded to the United States District Court for the Southern District of California.

Upon reconsidering the matter, the same trial judge resentenced Mrs. Yates to one year in jail. This judgment is now here and we are again asked to review the sentence. The case is here on its merits.

As we said in our original opinion, the sentence is severe, but, in our view, the sentence is within constitutional bounds and within the area reserved to the trial court's discretion and not to be disturbed by this court.

We interpret the mandate of the Supreme Court's opinion to be that the trial judge should take another look at some ameliorating circumstances which it listed. It issued no command that the sentence be reduced.

We find nothing different here that obtains in every case where the defendant thinks he was sentenced too heavily and has no other claim on which to attack his sentence. Therefore, judgment will be affirmed.

As to bail, if the trial court had made a positive determination that the defendant was a risk to respond to further orders of the court, we would be most reluctant to grant defendant's request for bail which has heretofore been denied in that court.

Counsel for appellant has indicated in open court the intention to seek certiorari if the appeal should be here rejected. The amount of new record is extremely small. Therefore, the order of this court is that Mrs. Yates be admitted to bail in the amount of $5,000.00, pending determination of such petition for certiorari, all provided that such petition be filed in the Supreme Court of the United States within thirty days from date. The bail and the form thereof shall be approved by the United States District Court for the Southern District of California, or a judge thereof.

Judgment affirmed.

(Endorsed): Per Curiam Opinion. Filed Feb. 7, 1958.

PAUL P. O'BRIEN, Clerk.

APPENDIX B.

Memorandum of Decision.

United States District Court, for the Southern District of California, Central Division.

United States of America, Plaintiff, v. Oleta O'Connor Yates, Defendant. Cr. No. 22379.

Filed Jan. 28, 1958.

MATHES, District Judge:

It is now almost six years since the defendant at the bar, Oleta O'Connor Yates, and thirteen other paid, full-time functionaries of the Communist Party were on trial in this court under an indictment charging them with conspiracy to commit offenses against the United States [18 U.S.C. §371] prohibited by the Smith Act. [54 Stat. 670 (1940), 18 U.S.C. §10 (1946), §2385 (1952)] "by wilfully * * * advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence * * * and by (2) wilfully * * * helping to organize as the Communist Party of the United States of America * * * a group * * * of persons who teach and advocate the overthrow * * * of the Government of the United States by force and violence, with the intent of causing the * * * overthrow * * * of the Government * * * by force and violence as speedily as circumstances would permit." [See: United States v. Schneiderman, 102 F.Supp. 52, 102 F.Supp. 87 (S.D.Cal. 1951). United States v. Spector, 102 F.Supp. 75 (S.D.Cal. 1951); United States v. Schneiderman, 104 F.Supp. 405, 106 F.Supp. 731, 106 F.Supp. 892, 106 F.Supp. 906, 106 F.Supp. 941 (S.D.Cal. 1952); United States v. Yates, 107 F.Supp. 408, 107 F.Supp. 412 (S.D.Cal. 1952).]

The judgment of conviction entered upon the verdict of the jury was affirmed by the Court of Appeals [Yates v. United States, 225 F.2d 146 (9th Cir. 1955)], and later reversed by the Supreme Court [354 U.S. 298 (1957).] On December 2, 1957, upon the Government's motion, the indictment was dismissed on the ground that the prosecution "cannot satisfy the evidentiary requirements laid down by the Supreme Court in its opinion reversing the convictions . . . ."

Toward the close of the long trial which began in February and ended in August of 1952, after the Government had rested its case, defendant Yates alone of the fourteen defendants chose to take the witness stand. On direct examination she told what she wanted to tell day after day for many days. She was an extremely articulate witness and her appearance was a cleverly-staged stratagem, affording her the opportunity in effect to argue the defendants' case to the jury while purporting to give evidence on the issue of her state of mind or intent.

When at length the time came for Government counsel to cross-examine, it soon developed that defendant Yates came prepared and determined to testify only to such matters as she saw fit. She repeatedly declined to answer questions, and in defiance of the authority of the court persisted in her refusal after being instructed by the court to answer. All of this took place in the presence of the jury and in a courtroom crowded with spectators.

The criminal trial was interrupted and a hearing had. Upon this hearing counsel for the defense conceded that the questions which defendant Yates as witness had blatantly refused to answer were properly put to her, and that her conviction and punishment for contempt of court were matters "unquestionably . . . exclusively within

the Court's sound discretion." [See United States v. Toner, 173 F.2d 140, 144 (3rd Cir. 1949).]

The only excuse offered for this repeated definance of the court was the sporting proposition that one does not wish to be an informer against anyone.

On the occasion in question here (there were others—see United States v. Yates, *supra*, 107 F.Supp. 407, 107 F.Supp. 412; reversed, 227 F.2d 844, 227 F.2d 848 (9th Cir. 1955), defendant Yates was held in criminal contempt for refusal to answer eleven separate questions, and sentenced to imprisonment for one year on each of the eleven specifications of criminal contempt, all sentences to commence and run concurrently. The Court of Appeals affirmed. [Yates v. United States, 227 F.2d 851 (9th Cir. 1955).]

Upon certiorari [350 U.S. 947 (1956)], the Supreme Court held that the eleven defiances constituted but a single contempt, and reversed the conviction as to specifications II to XI, affirmed the conviction as to specification I, but vacated the sentence and remanded the case to this court for resentencing on specification I. [Yates v. United States, 355 U.S. 66 (Nov. 25, 1957); cf: Hirabayashi v. United States, 320 U.S. 81, 85 (1943); Sinclair v. United States, 279 U.S. 263, 299 (1929).]

The mandate of the Supreme Court, filed in this court on January 15, 1958, reads in part:

"THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Ninth Circuit, and was argued by counsel.

"ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court as follows: The contempt convictions on specifications II-XI, inclusive, in this cause,

be, and they are hereby, reversed. The contempt conviction on specification I, be, and it is hereby, affirmed, but the sentence on that conviction is vacated.

"It is further ordered that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of California for resentencing in the light of the opinion of this Court."

I am admonished by the Supreme Court in its opinion that this court should now consider "the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behavior . . . ." [Yates v. United States, *supra*, 355 U.S. at 75; United States v. United Mine Workers, 330 U.S. 258, 303 (1947).]

As I understand that admonition, the extent of the defiance and the seriousness of the consequences are to be considered in the setting that existed at the time—remembering not alone the words spoken as recorded in the stenographic transcript, but also everything that occurred in the presence of this court in connection with the matter.

The record of the more-than-six-months' trial of defendant Yates and her thirteen co-defendants "consists of some 14,000 typewritten pages." [Yates v. United States, *supra*, 354 U.S. at 327, n. 34.] Reading at the rate of one page per minute throughout each hour of each eight-hour day, without rest or interruption, thirty consecutive days and more would be required in order merely to read that record of the words spoken—what was heard at the trial.

But what was heard at the trial tells only part of the story, and unfortunately my command of the English language is not such as to enable me to tell the rest—to

describe adequately all that was seen or otherwise perceived by the senses as the words were spoken, and before and after.

From her own lips I learned that defendant Yates is a native-born American citizen and a graduate of the University of California; that she has been for many years an ardent and zealous Communist; that while in college she became a Socialist, but became convinced that the Socialist movement would not, because of its peaceful methods, be successful in this country; that she thereupon cast her lot with the Communist Party and embraced Lenin's teachings that only through forcible overthrow of the capitalist governments in power can socialism be established.

The Supreme Court observed that the defendant's "reluctance to be an informer" is "understandable" and a "factor" to be considered. But it must be remembered too that to be compelled to be an informer is distasteful to all freemen. Yet, if the trial courts of our land did not have and exercise the power to compel witnesses to become informers, our system of justice would in time collapse, and with it all of our courts.

Indeed, in criminal matters, with respect to all public offenses, the policy of the law is to encourage the citizen to become an informer. [See: Roviaro v. United States, 353 U.S. 53, 59 (1957); In re Quarles and Butler, 158 U.S. 532, 535-536 (1895); Vogel v. Gruaz, 110 U.S. 311, 316 (1884).] And one of the provisions of our Bill of Rights guarantees to every person accused of crime the right "to have compulsory process for obtaining witnesses in his favor" [U. S. Const. Amend. VI], which, to be meaningful at all, necessarily presupposes the power of the court to compel those witnesses to testify—to become informers.

Another factor to be taken into account in "reconsidering the sentence" imposed upon defendant Yates, states the Supreme Court's opinion, is "her apparently courteous demeanor." [355 U.S. at 75.] In the words spoken, yes, defendant Yates was courteous; but in attitude she was the most coldly defiant and wholly contemptuous witness I have ever seen in more than thirty years at the bar and on the bench.

Perhaps defendant Yates achieved this questionable distinction because she was not the ordinary witness who, when surprised by a question he feels morally obligated not to answer, defies the authority of the court. She knew when she elected to take the stand that she would almost certainly be called upon to defy the authority of the court. Her contempt then was planned, deliberate, and cynical.

Moreover, her contempt was real. She in fact evinced sincere and utter contempt—not alone for the authority of the court, but also for the American system of government and justice—as she sat on the witness stand and, in the presence of the jury and the bar and a courtroom crowded with spectators, repeatedly and defiantly refused to bow to the authority of the court.

Like one speaking words of apology while thumbing his nose at the person addressed, defendant Yates showed her contempt by action and demeanor rather than words. The cold printed record of the "courteous" words spoken unhappily cannot reveal to the reader the insincere mockery of impeccable manners, the condescending attitude of contemptuous superiority revealed in the inflection of voice, the expressions of the face and the hands, the shrug of the shoulders.

Nor can the cold printed record reproduce the scene, the setting in which the action took place. The all-but-

audible "cheering" and "booing" of the "rooting section" in the audience; the supercilious half-smirk, half-smile visages of the thirteen co-defendants who inaudibly applauded every defiance.

I only regret my inability to describe adequately the corrupting influence upon the entire trial scene of the defendant's conduct in repeatedly displaying for all present the consummate in disrespect and contempt for the authority of the trial court.

It is the great good fortune of trial judges that our system of justice provides appellate courts to review their work and correct their demonstrable errors; it is an unvoidable misfortune that appellate judges must rest their labors upon the cold printed record of words spoken which all too frequently do not adequately tell what actually took place in the trial court.

As so well put by appellate judges themselves in Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77 (2d Cir. 1949), "the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' . . . A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit

before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him." [175 F.2d at 80.]

18 U.S.C. §401 declares that: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority * * * as * * * (3) Disobedience * * * to its lawful * * * order * * * or command."

It is settled that a sentence within the limits permitted by law rests within the discretion of the trial court. This is so because the appellate courts recognize that the printed record does not reveal all the relevant considerations guiding judgment in such matters. As the Supreme Court has said, "there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment." [Blockburger v. United States, 284 U.S. 299, 305 (1932); and see Kawakita v. United States, 343 U.S. 717, 745 (1952).]

One of the most renowned of legal philosophers teachs that the judgment of the court should be determined by "a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience." [Pound, Justice According to Law, 91 (1951).]

We read much today about disparity between sentences of different judges for the same offense. It is an age-old problem, complicated by the oft-forgotten fact that the defendants are different individuals and the circumstances surrounding the "same offense" differ widely. [See: Yankwich, Individualization of Punishment in the Federal Courts, 20 F.R.D. 385 (1957); Sheldon Glueck, The Sentencing Problem, 20 Federal Probation 19 (1956).]

With all due deference to those who may differ, I think that one year of imprisonment is little enough punishment for the privilege of putting on the performance defendant Yates did. A witness in a case involving grave criminal charges ought not to be able to purchase, with a mere fine or short jail term, a license to "pick and choose" the questions he deigns to answer, the evidence he wishes to give. The administration of criminal justice in this country cannot afford such cheap immunity.

Moreover, the defendant Yates might well reflect that for like conduct in Communist Russia, which she would have this country emulate, she would have been given (in 1952, not 1958) perhaps a lifetime to think things over in the mines or the forests of Siberia—or perhaps only until the crack of a rifle in the dawn of the day after.

I have reconsidered the sentence in the light of the Supreme Court's opinion, as the mandate of the Court has directed. In the interest of justice and to vindicate the authority of the court in this case, I sentence the defendant to imprisonment for the period of one year for the offense of criminal contempt set forth in Specification I, her conviction of which has been affirmed by both the Court of Appeals and the Supreme Court.

APPENDIX C.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 15,880.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: February 7, 1958

PAUL P. O'BRIEN, Clerk.

APPENDIX D.

Constitutional and Statutory Provisions Involved.

Constitution, Amendment V.

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Constitution, Amendment VIII.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C., Section 401

Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command. June 25, 1948, c. 645, 62 Stat. 701.

Federal Rules of Criminal Procedure—Rule 42

Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX E.

Record Page	Objection	Answer	Ruling
10,170	Immaterial	Goes to state of mind	Overruled
10,176	Leading and suggestive	Preliminary	Overruled
10,185-6	Invading province of jury	Goes to witness' understanding of Marxism-Leninism	Overruled
10,200-2	No relation to issues	State of mind	Overruled
10,207-8	Immaterial	State of mind	Overruled
10,220	Immaterial	State of mind	Overruled
10,234	Calls for conclusion	None	Sustained—Ambiguous and indefinite
10,241	No proper foundation	None	Overruled
10,270	Immaterial	State of mind	Overruled
10,257	Immaterial	State of mind	Overruled
10,264	Vague	State of mind	Overruled
10,276	Calls for conclusion	None	Sustained with directions to reframe
10,285-6	3 questions—Conclusions and assuming facts	———	Sustained—with instructions to restate
10,286	Assuming facts	None	Overruled—Calls for understanding
10,287	Immaterial	Understanding	Overruled
10,294	Compound and ambiguous	None	Overruled
10,297-8	Assuming fact not in evidence	Understanding	Overruled
10,315	No grounds	None	Sustained
10,315	Invading province of jury	None	Overruled
10,324	Leading	None	Overruled
10,325	Ambiguous	None	Sustained
10 326	Ambiguous	Understanding	Overruled
10,329	Argumentative	None	Overruled
10,338	Immaterial	Understanding	Overruled
10,349	Immaterial	None	Overruled
10,364	Immaterial	None	Overruled
10,366	Indefinite	None	Overruled
10,369-70	Immaterial	State of mind	Overruled
10,380	Argumentative	———	Sustained in that form

Record Page	Objection	Answer	Ruling
10,382-3	Asked and answered	None	Overruled
10,402	Repetitious	Is not	Overruled
10,416	Immaterial	Goes to understanding of Marxism-Leninism	Overruled
10,434	Immaterial	State of mind	Overruled
10,435	Immaterial	None	Overruled
10,438	Collateral	Preliminary	Overruled
10,439-40	Immaterial	None	Overruled
10,440	Assuming facts not in evidence	Pointing to evidence	Overruled
10,449	Immaterial	None	Overruled
10,457-8	Immaterial	None	Overruled
10,466	Lack of foundation	Understanding	Overruled
10,469	Too broad	Understanding	Overruled
10,470	Not responsive	None	Overruled
10,470	No bearing on issue	None	Overruled
10,483-87	Immaterial	Understanding	Overruled
10,489-90	Not clear	Preliminary	Overruled
10,502	Not connected	Preliminary	Overruled
10,516	No foundation or connection	Preliminary	Overruled
10,523	Conclusion	No objection	Sustained
10,526	Too general	None	Overruled
10,579-80	Collateral	Understanding	Overruled
10,582-83	Collateral	Understanding	Overruled
10,584	Collateral	None	Overruled
10,592-93	Collateral	Understanding	Overruled
10,600-02	Collateral	Understanding	Overruled
10,606	Collateral	Understanding	Overruled
10,615	Collateral	None	Overruled
10,622	Immaterial	Understanding	Overruled
10,633	Invades province of jury	None	Overruled
10,640	Immaterial	None	Overruled
10,641	Compound	None	Sustained
10,651	Immaterial	Understanding	Overruled
10,676	Asked and answered	Not same question	Overruled
10,718	Not exact quote	———	Sustained
10,722	Leading and suggestive	None	Overruled
10,725-26	Immaterial	None	Overruled—calls for understanding

Record Page	Objection	Answer	Ruling
10,805	Not qualified to testify on issue	Understanding	Overruled
10,819	Immaterial	None	Overruled
10,824	Immaterial	Understanding	Overruled
10,850	Leading and suggestive	None	Overruled
10,874	Asked and answered	Not asked	Overruled
10,887	Asked and answered	Understanding	Overruled
10,897	Ambiguous	None	Overruled
10,954-55	Vague	None	Sustained
10,955	Irrelevant	None	Sustained
10,964	Asked and answered	None	Overruled
10,971-72	Immaterial	Understanding	Overruled
11,013-14	Beyond issues	Understanding	Overruled
11,016-17	Immaterial	Understanding	Overruled
11,020	Immaterial	None	Overruled
11,022	Immaterial	None	Overruled
11,023-24	Immaterial	Understanding	Overruled
11,026-28	Not responsive	None	Overruled
11,030	No foundation	None	Sustained
11,030-33	No foundation	Foundation previously laid	Overruled
11,034	Immaterial	Understanding	Overruled
11,042	Immaterial	Understanding	Overruled
11,053	Opinion and conclusion of witness	None	Overruled—understanding
11,063	Immaterial	———	Overruled
11,064	Opinion	None	Sustained
11,070	Opinion and conclusion	Understanding	Overruled
11,081	Immaterial	Understanding	Overruled
11,158	Form of question	None	Sustained
11,762	Improper question	Understanding	Overruled
11,775	Not proper redirect	Not previously covered	Overruled
11,778-79	Not proper redirect	Not previously covered	Overruled
11,785	Irrelevant	None	Overruled
11,800	Assumes facts	None	Sustained
11,801-02	Previously answered	Answer to inquiry of court	Overruled
11,811	Previously answered	Preliminary	Overruled

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In the Supreme Court of the United States

OCTOBER TERM, 1957

OLETA O'CONNOR YATES, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In its decision of November 25, 1957 (*Yates* v. *United States*, 355 U.S. 66), affirming, as to specification I, petitioner's conviction of criminal contempt of the United States District Court for the Southern District of California, this Court reversed the remaining specifications, II-XI, inclusive, pursuant to its holding (*id*, at 72-74) that petitioner's several refusals to answer the questions there in issue, put to her while under cross-examination as a witness in her own be-

half at her trial for conspiracy to violate the Smith Act, constituted in legal effect but one contempt. Since petitioner's several one-year sentences—one under each specification—had been designated to run concurrently, the reversal as to specifications II-XI did not have the effect of reducing her total sentence in a practical sense. This Court, recognizing the possibility that the District Court's "judgment as to the proper penalty was affected by the view that petitioner had committed 11 separate contempts" (*id*, at 75), vacated the sentence under specification I and remanded the case to the District Court "for resentencing in the light of this opinion" (*id*, at 76).

In addition, this Court referred to a number of factors which it thought "point[ed] up the necessity * * * of having the trial judge reconsider the sentence in the cool reflection of subsequent events" (*ibid.*). These factors were essentially as follows: that petitioner had "served a total of over 70 days in jail awaiting final disposition of the several proceedings against her"; that her "conspiracy conviction" (under the Smith Act) and another criminal contempt conviction had been reversed; that the Court of Appeals had termed the one-year sentence imposed for the acts of contempt involved in the proceedings at bar "severe"; the "understandable reluctance to be an informer" which petitioner said had motivated her to refuse to answer the questions; her "apparently courteous demeanor" while declining to answer; and "the fact that her refusals seem to have had no perceptible effect on the outcome of the trial" (*id*, at 75-76). The Court observed that the District Court, on remand, should consider the "extent of the willful and deliberate de-

fiance of the court's order [and] the seriousness of the consequences of the contumacious behavior" (*id*, at 75, quoting from *United States* v. *United Mine Workers*, 330 U.S. 258, 303).[1]

On January 28, 1958, the District Court (Mathes, D. J.) again sentenced petitioner to one year's imprisonment on specification I (Pet. App. 11). In a written opinion filed in connection with the resentencing (Pet. App. 3-11), Judge Mathes fully stated his reasons for doing so.

Adverting to this Court's direction to consider "the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behavior," Judge Mathes stated his understanding of the instruction to be that he should consider the extent of the defiance and the seriousness of the consequences "in the setting that existed at the time—remembering not alone the words spoken as recorded in the stenographic transcript, but also everything that occurred in the presence of this court in connection with the matter" (Pet. App. 6). Among other factors to which he referred in his opinion as not reflected in the transcript, and which he said he was taking into consideration in reimposing a one-year sentence, was his recollection (Pet. App. 8) that

> [i]n the words spoken, yes, defendant Yates was courteous; but in attitude she was the most coldly

[1] The Court also noted that, because the contempt sentence was ordered to commence upon completion of the five-year sentence in the conspiracy case, which had in the meantime been reversed by this Court (*Yates* v. *United States*, 354 U.S. 298), the date on which service of the contempt sentence was to commence had been rendered uncertain (355 U.S. at 76, fn. 10).

> defiant and wholly contemptuous witness I have ever seen in more than thirty years at the bar and on the bench.

"Moreover," he said, "her contempt was real. She in fact evinced sincere and utter contempt—not alone for the authority of the court, but also for the American system of government and justice—as she sat on the witness stand and, in the presence of the jury and the bar and a courtroom crowded with spectators, repeatedly and defiantly refused to bow to the authority of the court" (*ibid.*).

"Like one speaking words of apology while thumbing his nose at the person addressed," Judge Mathes' opinion continues, "defendant Yates showed her contempt by action and demeanor rather than words. The cold printed record of the 'courteous' words spoken unhappily cannot reveal to the reader the insincere mockery of impeccable manners, the condescending attitude of contemptuous superiority revealed in the inflection of voice, the expressions of the face and the hands, the shrug of the shoulders" (*ibid.*).

The opinion mentions also the "all-but-audible 'cheering' and 'booing' of the 'rooting section' in the audience; the supercilious half-smirk, half-smile visages of the thirteen co-defendants who inaudibly applauded every defiance" (Pet. App. 8-9). "I only regret my inability to describe adequately," the judge stated (*id.* 9),

> the corrupting influence upon the entire trial scene of the defendant's conduct in repeatedly displaying for all present the consummate in disrespect and contempt for the authority of the trial court.

Indicating that he had "reconsidered the sentence in the light of the Supreme Court's opinion, as the mandate of the Court has directed," Judge Mathes concluded his opinion by stating that he sentenced petitioner to imprisonment for one year "[i]n the interest of justice and to vindicate the authority of the court in this case" (Pet. App. 11).

The Court of Appeals, on February 7, 1958, declined to alter the sentence (Pet. App. 1-2). "As we said in our original opinion," the court said, "the sentence is severe, but, in our view, the sentence is within constitutional bounds and within the area reserved to the trial court's discretion and not to be disturbed by this court" (*id,* 1). "We interpret the mandate of the Supreme Court's opinion to be that the trial judge should take another look at some ameliorating circumstances which it listed," the Court of Appeals continued. "It issued no command that the sentence be reduced" (*id,* 2). "We find nothing different here," said the court, "tha[n] obtains in every case where the defendant thinks he was sentenced too heavily and has no other claim on which to attack his sentence" (*ibid.*).[2]

The petition for a writ of certiorari was filed on March 7, 1958. We submit it presents no question meriting further consideration by this Court.

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[2] Upon counsel's representation that he intended to petition this Court for a writ of certiorari if his appeal to the Court of Appeals failed, the Court of Appeals ordered petitioner to be admitted to bail in the amount of $5,000 pending determination of such petition, provided such petition was filed within 30 days from the date of affirmance (Pet. App. 2). Petitioner, having furnished the aforesaid bail, has been at liberty since February 12, 1958 (Pet. 9).

1. While conceding that "[i]t is, of course, true that this Court in remanding did not suggest the amount of punishment," petitioner intimates, nevertheless, that the District Court obeyed "[n]either the letter nor the spirit of the opinion and mandate of this Court" in failing to reduce the sentence originally imposed (Pet. 11). We submit that there is no merit in the suggestion. This Court directed the District Court to take into consideration the several factors mentioned in its opinion (*supra*, pp. 2-3) in resentencing petitioner, but in nowise suggested that the court's discretion as to the amount of the sentence (those factors having been taken into account) should be curtailed or limited. The Court of Appeals correctly observed that this Court "issued no command that the sentence be reduced" (Pet. App. 2).

2. Petitioner urges, however (Pet. 10-18), that Judge Mathes "arbitrar[ily] refus[ed] to consider or to apply the specified mitigating factors" (Pet. 10) mentioned in this Court's opinion. He "essentially disregarded," it is said, "every circumstance which led this Court to vacate the original sentence and which [he] was requested to consider on resentence" (Pet. 11). This contention is not supported by the record. Judge Mathes explicitly states in his opinion that he "reconsidered the sentence in the light of the Supreme Court's opinion, as the mandate of the Court has directed" (Pet. App. 11; see, also, *id*, at 5-6). His opinion (*id*, 3-11) reflects, moreover, that he read and considered this Court's opinion with care. Some of the factors mentioned therein he quotes and discusses at length (see *id*, at 6, 7, 8-9). There is, we believe, no basis for the suggestion (see, *e.g.*, Pet. 12. 17) that factors mentioned by this Court which are not ex-

pressly alluded to in Judge Mathes' opinion were ignored by him.

Equally insubstantial is the contention (Pet. 12) that the judge, by referring in his opinion to petitioner's "repeated" defiance of the court (*e.g.*, Pet. App. 5), in effect disregarded this Court's decision that her repeated refusals to answer constituted but one contempt in law. While her contempt was single in substance, her refusals (collectively constituting one offense) were in fact repeated over a period of time. The judge implied nothing more.

The factors stressed by Judge Mathes as considerations which influenced him to reimpose a one-year sentence (*supra*, pp. 3-4)—*i.e.*, attitudes and innuendoes displayed by petitioner which, not appearing from the cold print of the record, could only be seen or sensed by the participants in the living courtroom scene—have frequently been recognized as factors which may be taken into account by the trial judge. Indeed, it is because of these factors that punishment for contempt is so peculiarly a matter to be left in very large measure to his discretion. *E.g., Fisher* v. *Pace*, 336 U.S. 155, 161; *Hallinan* v. *United States*, 182 F. 2d 880, 888 (C.A. 9), certiorari denied, 341 U.S. 952.[3]

Nor is there substance to petitioner's complaint that

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[3] "In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude * * *" (*Fisher* v. *Pace*, *supra*, 336 U.S. at 161).

"We cannot have the same appreciation of an existing situation, from a review of a cold record, as does a presiding judge who witnesses the transgressions and senses the unfavorable impact upon the orderly administration of justice" (*Hallinan* v. *United States*, *supra*, 182 F. 2d at 888).

it was error for Judge Mathes to take account of "the 'all-but-audible' action of the audience" and "the 'inaudible' applause or visages of her co-defendants" because "[t]hese were extraneous and irrelevant matters" for which she "was in no way responsible" (Pet. 23-24). While she is not chargeable with responsibility for the actions of her "cheerers" and "rooters," there was no duty on Judge Mathes' part to disregard (if such were possible) these background factors in the courtroom scene as he recalled petitioner's actions and attitudes (*supra*, pp. 3-4) and sought to evaluate the extent to which her own conduct displayed "disrespect and contempt for" his authority as presiding judge (Pet. App. 9).[4]

3. Petitioner's contention that the length of the sentence imposed was in part the product of the judge's giving consideration to "irrelevant" and "extraneous" factors (Pet. 19-24) likewise presents no issue requiring the further consideration of this Court.

Whether petitioner's action in taking the stand was taken in good faith for the purpose of "giv[ing] evidence on the issue of her state of mind or intent," or whether this was merely a "cleverly-staged stratagem, affording her the opportunity in effect to argue the defendants' case to the jury while purporting to give [such] evidence" (Pet. App. 4), was a legitimate con-

[4] Petitioner's suggestion (Pet. 25-26) that her trial for contempt should have been prosecuted on notice and hearing under Rule 42(b), F.R. Crim. P., rather than summarily under Rule 42(a), is plainly lacking in merit. Its premise is that her sentence "was based principally upon charges of alleged conduct not occurring in the presence of the court" (Pet. 25). The record is clear, however, and nothing now advanced by petitioner is to the contrary, that her misconduct took place entirely in the presence of the court.

sideration for the judge to take into account in assessing the penalty for her admitted offense. And from his position of vantage as presiding judge, Judge Mathes was competent to infer, we believe, which of these hypotheses was the true one. If a "stratagem" was involved, as Judge Mathes believes, it was not necessarily planned "out of the Court's presence," as petitioner suggests (Pet. 19), nor would it be material, we think, if the judge's conviction in this respect may not have been arrived at (see Pet. 20-21) until some time after the trial had been concluded.

Whether petitioner's contumacy was "planned, deliberate, and cynical", as Judge Mathes believes it was (Pet. App. 8), or whether petitioner took the stand without any subjective reason to anticipate that in so doing she might be called upon to give testimony which she was determined at all events to withhold (see Pet. 22-23), was likewise a permissible factor for the judge to take into consideration in imposing sentence, and Judge Mathes was, here too, the person best qualified to determine whether the one or the other of these alternatives was true. And there is nothing, it is submitted, in the judge's allusion to the likelihood that an offense similar to petitioner's would be punished more severely "in Communist Russia" than in this country (Pet. App. 11) to give substance to her complaint (Pet. 24) that the relative rigor of the Soviet penal system was a factor taken into consideration in the selection of an appropriate sentence here. This is also true of the judge's passing reference to aspects of petitioner's testimony at the main trial on the issue of forcible overthrow and her intent and understanding with respect thereto (Pet. App. 7). And even if, as she claims (Pet. 21-22), he misinterpreted her testimony in these

respects, that fact would not be a ground for this Court to interfere with his exercise of discretion as to a suitable penalty for her admitted offense.

4. Petitioner renews her contention (Pet. 26-30), also advanced when her case was here before (see 355 U.S. at 71), that the imposition of a one-year sentence under all the circumstances here obtaining was violative of due process and of the Eighth Amendment's prohibition against "cruel and unusual punishments." This argument was, however, implicitly rejected by this Court when, in remanding the case for resentencing in the light of the factors mentioned in its opinion, it refrained from delimiting the freedom of the trial judge to impose such punishment as he thought fitting after taking those factors into account. The present petition presents no grounds for reaching a different result at this time. On the contrary, the contention is even less persuasive now than it was before. The significant factors which Judge Mathes refers to in his opinion on resentencing as having influenced him to impose originally, and to reimpose upon remand, a one-year sentence (see *supra*, pp. 3-5) were not reflected in the original record before this Court.

For the foregoing reasons, we believe that the reimposition of a one-year sentence was consistent with this Court's opinion and mandate, that it was not arbitrary or unreasonable, and that the petition for a writ of certiorari should be denied. If, however, the Court should be of the view that the sentence imposed, under all the circumstances, is unduly severe, it is suggested that it would be appropriate for the Court, without further briefs or argument, to effect such

modification as it may deem proper. Cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 304-305; *Green and Winston* v. *United States*, No. 100, this Term, decided March 31, 1958, slip op., p. 22.

Respectfully submitted.

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APRIL 1958.

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